IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 23, 2007 Session

PHILIP LATIFF, AS EXECUTOR OF THE ESTATE OF MARY WOODS LATIFF v. TRACY W. DOBBS, M.D., ET AL.

Appeal from the Knox County Circuit Court
No. 3-132-01 Wheeler A. Rosenbalm, Judge

No. E2006-02395-COA-R3-CV - FILED JANUARY 29, 2008

In this medical malpractice action, Mary Woods Latiff ("Ms. Latiff") was a patient of Dr. Tracy Dobbs, an oncologist employed by East Tennessee Oncology and Hematology, P.C., ("East Tennessee Oncology") (collectively "Defendants"). Ms. Latiff underwent chemotherapy to reduce her chance of a recurrence of cancer. After her fourth chemotherapy session, Ms. Latiff developed complications, including vomiting, diarrhea, nausea, and abdominal pain. Ms. Latiff's family made numerous phone calls to Defendants over the next few days. A nurse at Defendants' office called in a prescription to treat Ms. Latiff's symptoms, but the additional medications did not resolve Ms. Latiff's problems. The next day, the nurse advised Ms. Latiff's family to take her to the emergency room, but a family member stated that Ms. Latiff was too weak to go to the emergency room. As a result, home health services were ordered for Ms. Latiff for lab work and assessment. After the lab results were available, Dr. Dobbs ordered IV fluids with potassium to treat Ms. Latiff's dehydration and low potassium level. Several hours later, Ms. Latiff's family called an ambulance to transport her to the hospital because her condition had not improved. Ms. Latiff suffered a cardiac arrest before arriving at the hospital. She was revived, but died the following day. Ms. Latiff's family filed this lawsuit alleging negligence in Defendants' treatment of Ms. Latiff. The jury returned a verdict in favor of Defendants, and judgment was entered accordingly. Plaintiff's motion for new trial was denied, and an appeal was taken to this Court, raising numerous issues regarding exclusion of evidence, expert witness testimony, and jury instructions. After careful review, we hold that the Trial Court did not commit reversible error. We affirm and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Leslie A. Muse, Morristown, Tennessee, for the Appellant, Philip Latiff, as Executor of the Estate of Mary Woods Latiff.

Gary G. Spangler and Carrie S. O'Rear, Knoxville, Tennessee, for the Appellees, Tracy W. Dobbs, M.D., and East Tennessee Oncology and Hematology, P.C.

OPINION

I. Background

This is a medical malpractice case arising from the death of Ms. Latiff from chemotherapy-induced diarrhea and related complications. Ms. Latiff was diagnosed with colon cancer in late December of 1999 and underwent surgery the following month to remove the cancerous portion of her colon. During her hospital stay, Ms. Latiff met with Dr. Dobbs to discuss chemotherapy options to reduce the chance of her cancer recurring. Following this consult, Dr. Dobbs noted that Ms. Latiff, who was 72 years old, was "remarkably healthy" and "appeared younger than her stated age."

After recovering from her surgery, Ms. Latiff met with Dr. Dobbs again at East Tennessee Oncology. Dr. Dobbs then recommended, and Ms. Latiff agreed to, a six-month course of chemotherapy with 5-FU and Leucovorin. During this appointment with Ms. Latiff and two of her children, Joni White and Randy Latiff, Dr. Dobbs explained the chemotherapy plan and its potential side effects. Ms. Latiff and her children then participated in "chemo teaching," during which they watched an informational video. After they watched the video, one of the nurses explained the chemotherapy process and side effects in greater detail. Ms. Latiff and her children also took home additional literature about chemotherapy to read later.

Although Ms. Latiff was a resident of Middlesboro, Kentucky, she underwent surgery in Knoxville, Tennessee, which also was the location of East Tennessee Oncology's main office. The practice had several satellite offices, including locations in Harrogate, Morristown, Rockwood, Pigeon Forge, Oneida, Etowah, and Newport, Tennessee, and Middlesboro and Williamsburg, Kentucky. Ms. Latiff's chemotherapy plan called for her to receive most of her treatments at the East Tennessee Oncology office in Harrogate and for her to travel to the main office in Knoxville for chemotherapy approximately once every five or six weeks during her six-month course of treatment.

Ms. Latiff's first three chemotherapy treatments on February 10, 17, and 24, 2000, went well, and Ms. Latiff experienced no significant side effects from the sessions. However, a few days after Ms. Latiff's fourth chemotherapy treatment on Thursday, March 2, 2000, she began experiencing nausea, vomiting, abdominal pain, and diarrhea. Ms. Latiff took Imodium, an over-the-counter anti-diarrhea medicine, and Compazine, an anti-nausea prescription, as she had been advised during the chemo teaching at East Tennessee Oncology. The Imodium did not improve her condition, and on Monday, March 6, two of Ms. Latiff's daughters, Mrs. White and Linda Chadwell,

called East Tennessee Oncology regarding their mother's symptoms.[1] Mrs. White spoke with Nurse Karen Phillips. Nurse Phillips told Mrs. White that Ms. Latiff should continue taking the Imodium and Compazine and to let the office know if Ms. Latiff's condition did not improve.

That evening, Mrs. White again called East Tennessee Oncology after speaking with her mother and finding that she was still experiencing the same symptoms. The office was closed, but the answering service paged Dr. Briggs, East Tennessee Oncology's on-call doctor for that evening. Dr. Briggs called Mrs. White back, listened to her description of Ms. Latiff's problems following the most recent chemotherapy session, and advised her to take her mother to the emergency room. Mrs. Chadwell drove Ms. Latiff to the emergency room at Middlesboro Appalachian Regional Hospital, where hospital personnel drew blood for lab work and administered IV fluids to Ms. Latiff. After a few hours, Ms. Latiff was discharged around 12:45 a.m. on Tuesday, March 7, 2000.

During trial, Mrs. White testified that she called East Tennessee Oncology on March 7 to inform them of Ms. Latiff's trip to the emergency room the previous night. However, Nurse Phillips, who was the dedicated message nurse for East Tennessee Oncology during that time, denied receiving any such message or phone call. Although Ms. Latiff's vomiting had stopped by Tuesday, she still suffered from what she described to Mrs. White as a pregnancy-like nausea, and her diarrhea continued as well.

After speaking with Ms. Latiff on Wednesday morning, March 8, 2000, and finding that she still was having the same symptoms as the night before, Mrs. White again called East Tennessee Oncology. She reported that the Imodium had not stopped Ms. Latiff's diarrhea. Mrs. White further stated that Ms. Latiff had begun using Depends because she had become incontinent as a result of the diarrhea. As a result of this conversation, Nurse Phillips called in a prescription for Ms. Latiff for Phenergan and Lomotil for nausea and diarrhea, respectively. Mrs. Chadwell picked up the prescriptions for Ms. Latiff and brought them to her that day.

Ms. Latiff's condition worsened in spite of taking the new medications. Mrs. White testified that on Thursday, March 9, 2000, Ms. Latiff's diarrhea "was getting so bad and so – so much, that it would shoot out of her diaper, that at one point it shot up into her hair and that she had had to take a shower and that she was just sick." Mrs. White then called East Tennessee Oncology and spoke with Nurse Phillips. She told the nurse that Ms. Latiff had had twelve loose stools in the past 24 hours, a marked increase from the previous day, and that the new medicines had not helped. Other contents of this conversation were disputed at trial, but it was agreed that Nurse Phillips advised Mrs. White to take Ms. Latiff to the emergency room. Mrs. White testified that the purpose of the suggested visit was so that Ms. Latiff could receive Sandostatin, a stronger anti-diarrhea medicine which Ms. Latiff's insurance would not pay for unless it was prescribed at the emergency room. Nurse Phillips denied saying anything to Mrs. White about Sandostatin.

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[1]Mrs. White and her family reside in Seymour, Tennessee. Mrs. Chadwell and her family live in Harrogate, Tennessee, about 20 minutes from Ms. Latiff's home.

Regardless, Mrs. White advised Nurse Phillips, either during that conversation or by calling back a few minutes later, that Ms. Latiff was too weak to go the emergency room and asked if home health services ("Home Health") could be ordered instead. Mrs. White testified that she told Nurse Phillips that the family would pay for the Sandostatin shot if Home Health could administer it at Ms. Latiff's home, rather than having to take her to the emergency room. Nurse Phillips then consulted with Dr. Dobbs about Ms. Latiff's situation, and Dr. Dobbs approved an order for Home Health to visit Ms. Latiff, assess her condition, and draw blood for lab work. Home Health visited Ms. Latiff on the afternoon of Thursday, March 9, 2000, for that purpose. After some of the lab results were phoned in to East Tennessee Oncology, Dr. Dobbs ordered that IV fluids with potassium be administered to Ms. Latiff by Home Health, which was done shortly thereafter. A Sandostatin shot neither was ordered for nor given to Ms. Latiff during any Home Health visit.

Mrs. White drove to Middlesboro around midnight that night to check on her mother, whose condition had not improved. A few hours later, Mrs. White and her brother, Randy Latiff, who had been staying with Ms. Latiff since that afternoon, called for an ambulance to transport their mother to the emergency room. After the ambulance arrived, Ms. Latiff apparently went into cardiac arrest. She was subsequently revived at the hospital and then transferred to Baptist Hospital in Knoxville with permission of one of Dr. Dobbs' associates at East Tennessee Oncology. Ms. Latiff died on Saturday, March 11, 2000. Ms. Latiff's causes of death listed on her death certificate were cardiac arrhythmia, hypokalemia, and colon cancer. However, Dr. Dobbs testified that colon cancer was not a cause of Ms. Latiff's death, stating, "Miss Latiff I believe died of a complication of chemotherapy. I mean, she ultimately died, I think, from cardiac arrhythmia or cardiac arrest, but I think that was directly related to probably her potassium level that was related to her diarrhea from her chemotherapy."

On March 2, 2001, Ms. Latiff's son, Philip Latiff, as executor of her estate, filed a medical malpractice action against Dr. Dobbs, East Tennessee Oncology, and "Jane Doe, a nurse or nurses."[2] Dr. Dobbs and East Tennessee Oncology (collectively "Defendants") filed an answer denying any negligence on their part in their treatment of Ms. Latiff.

Defendants filed a Motion for Summary Judgment along with a Statement of Undisputed Facts and an affidavit of Dr. Dobbs. Defendants withdrew their Motion for Summary Judgment after Plaintiff filed a response to the motion, a response to the statement of facts, and an affidavit of an expert witness, Dr. Charles Greenberg.

Following discovery, Plaintiff filed a Pretrial Motion for Judicial Notice asking the Trial Court to take judicial notice of the Rules and Regulations issued by the Tennessee Board of Nursing as well as several statements supported by citations to specific Tennessee statutes. Plaintiff also filed a Motion for Partial Summary Judgment, accompanied by a Statement of Undisputed Facts

[2]Also joining in the lawsuit as plaintiffs were all of Ms. Latiff's children individually, Mrs. White, Randy Latiff, Philip Latiff, Mrs. Chadwell, Carla King, Connie Williams, and Mary Dee Yoblinski. However, all of the individual plaintiffs later were dismissed from the lawsuit by agreed order.

and excerpts from the depositions of Nurse Phillips and defense expert witness Dr. Richard Grapski. Plaintiff requested partial summary judgment "on the issue of whether nurse Karen Phillips acted outside the scope of appropriate nursing authority when she prescribed Lomotil to Mrs. Latiff on March 8, 2000." Defendants filed their responses opposing both of Plaintiff's motions. Following a hearing, the Trial Court entered an order denying Plaintiff's Motion for Partial Summary Judgment and taking judicial notice of "the law and rules and regulations referenced in Plaintiff's Motion for Judicial Notice."

Shortly before trial, Defendants filed a Motion in Limine requesting that the Trial Court enter an order prohibiting evidence or argument during trial about the following matters without first obtaining the Trial Court's permission:

> 1) To exclude from evidence any reference to, and any assertion that Nurse Karen Phillips "prescribed" Lomotil;
>
> 2) To exclude from evidence any reference to, or argument regarding the issue of whether Karen Phillips acted outside the scope of appropriate nursing authority when she "prescribed" Lomotil to Ms. Latiff on March 8, 2000; and
>
> 3) To exclude from evidence any reference to, or argument that when Karen Phillips "prescribed" Lomotil, she violated any statu[t]e or regulation as set forth in Tennessee Code Annotated, or the Rules of the Tennessee Board of Nursing.

The Trial Court heard arguments on Defendants' Motion in Limine but declined to rule on these evidentiary issues before they were presented at trial. Defendants renewed their Motion in Limine prior to the testimony of Plaintiff's nursing expert, at which time the Trial Court instructed the parties' lawyers as follows:

> None of these witnesses may testify about law matters, legal matters, they are here to testify about facts and medical opinions, and no witness is permitted to come in and say somebody violated this Statute or that Regulation, that is a matter of law.
>
> Now, if the facts show that the Regulation or the statutory provision is applicable I will tell the jury that is what the Statute or Regulation requires and it is for them to then determine whether or not somebody deviated from that . . . .
>
> * * *
>
> I instruct everybody not to ask any witness whether anybody violated

> a Statute, Rule or Regulation. Now, . . . certainly in your argument to me you may refer to them and you may insist that I give certain instructions based on these. But to leave all of those things to these experts is inappropriate . . . .

Before the close of the trial, Plaintiff filed Special Requests for Jury Instructions which were denied by the Trial Court. The Trial Court's instructions to the jury did not include any mention of the Rules and Regulations promulgated by the Tennessee Board of Nursing or the statutes about which Plaintiff had requested instructions. After deliberating for some time, the jury requested a copy of the jury charge. The Trial Court had not prepared written instructions and so reinstructed the jury on the issues of malpractice, wrongful death, and damages. After further deliberation, the jury returned a verdict for Defendants, and the Trial Court entered Final Judgment on that verdict.

Plaintiff filed a Motion for New Trial, raising several alleged errors by the Trial Court. Defendants responded in opposition to the motion. Plaintiff filed a Supplemental Motion for New Trial with copies of a transcript of the Trial Court's instructions to the jury. Following arguments by both parties, the Trial Court denied Plaintiff's Motion for a New Trial. Plaintiff appeals.

II. Discussion

Plaintiff presents eight issues for our review:

1. Whether the Trial Court erred in excluding the Rules and Regulations promulgated by the Tennessee Board of Nursing after having taken judicial notice of them.

2. Whether the Trial Court erred in excluding evidence regarding the statutory definition of the practice of nursing, the statutory definition of the practice of medicine, and the illegality of a nurse's prescription of a Schedule V narcotic.

3. Whether the Trial Court erred in allowing extensive voir dire of Plaintiff's expert witness, Dr. Greenberg.

4. Whether the Trial Court erred in referencing the standard for "oncology nurses" where Nurse Phillips was not an oncology certified nurse.

5. Whether the Trial Court erred in denying Plaintiff's request for special jury instructions regarding the statutory definition of the practice of medicine, the statutory definition of the practice of nursing, and negligence per se.

6. Whether the Trial Court erred in charging the jury regarding a "mistake in judgment" by a medical provider.

7. Whether the Trial Court erred in other charges which allegedly are inconsistent with the precise parameters of Tenn. Code Ann. § 29-26-115(a).

8. Whether the Trial Court erred in failing to give a correct and consistent charge and in failing to reduce the charge to writing.

Plaintiff's issues on appeal can be grouped into three basic categories – exclusion of evidence, expert witnesses, and the jury charge. We will address these issues accordingly.

A. Exclusion of Evidence

Trial courts have a wide degree of latitude in deciding whether to admit or exclude evidence. *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001). As a result, we review issues regarding admission of evidence under an abuse of discretion standard. *Id.* Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, stating:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Appellate courts ordinarily permit discretionary decisions to stand when reasonable judicial minds can differ concerning their soundness. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999). A trial court's discretionary decision must take into account applicable law and be consistent with the facts before the court. *Id.* When reviewing a discretionary decision by the trial court, the "appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision." *Id.*

Plaintiff asserts that the Trial Court erred in excluding the Rules and Regulations promulgated by the Tennessee Board of Nursing after having taken judicial notice of them. Tennessee Rule of Evidence 202, which governs judicial notice of law, provides as follows regarding judicial notice of state regulations:

> Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of . . . (2) all duly published regulations of federal and state agencies and proclamations of the Tennessee Wildlife Resources Agency . . . .

Tenn. R. Evid. 202(b). However, Rule 202 does not require a court to admit into evidence any law or regulation of which the court has taken judicial notice. A court that takes judicial notice of facts under Tenn. R. Evid. 201 must instruct the jury about those facts, *see* Tenn. R. Evid. 201(g)[3], but a similar provision does not exist for judicial notice of law.

Therefore, the admissibility of any law or regulation which the Trial Court judicially noticed must be considered as any other piece of potential evidence offered for admission. In this case, the Rules of the Tennessee Board of Nursing, Tenn. Comp. R. & Reg. 1000-1-.01, *et seq.*, ("the Nursing Rules") which Plaintiff attached to its Motion for Pretrial Notice were labeled with a date of "June, 2003 (Revised)." However, Defendants' treatment of Ms. Latiff occurred in 2000, more than three years before the version of the Nursing Rules offered by Plaintiff.

In an apparent effort to remedy this problem, Plaintiff also attached a 2004 copy of the Administrative History of the Nursing Rules. As Defendants correctly pointed out to the Trial Court, the administrative history of a Tennessee Rule or Regulation does not "constitute prima facie evidence of the regulatory law of the State of Tennessee . . . ." Tenn. Code Ann. § 4-5-221(c)[4]. Thus, Plaintiff could not use the administrative history to establish that the portions of the Nursing Rules upon which they intended to rely were the same in 2003 as they were in 2000.

Plaintiff also made an offer of proof regarding the validity of the Nursing Rules by the testimony of Nurse Ruby Wiseman, which we recite in pertinent part as follows:

> Q. And I am going to show to you a document that I will represent to you Counsel has a copy, it is a Rule of the Tennessee Board of Nursing, it is the entire section or at least beginning on Page 6, 1000-1-.04 and I will direct you to Subsection 3B on Page 8.
>
> A. Yes, ma'am.
>
> * * *
>
> Q. Okay. Nurse Wiseman, is there a date on the bottom left-hand

[3]Rule 201(g) of the Tennessee Rules of Evidence provides as follows: "In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any *fact* judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Tenn. R. Evid. 201(g) (emphasis added).

[4]Subsection (c) of Tenn. Code Ann. § 4-5-221 provides as follows: "Upon publication of the administrative code and upon publication of each issue of the monthly administrative register, the text of the rules, *but not the administrative histories or editorial matter*, appearing in each volume or issue of the administrative code or administrative register, containing a copy of the secretary of state's certificate of approval, shall constitute prima facie evidence of the regulatory law of the state of Tennessee and be received, recognized, referred to and used in all courts, agencies, departments, offices of and proceedings in the state of Tennessee as the official compilation of the regulatory law of the state of Tennessee."

side of that page?

A. Yes, ma'am, it says June 2003, Revised.

Q. Okay. Do you have an opinion whether or not this particular portion of the Rules and Regs was in effect in March of 19 – excuse me – March of 2000?

A. Yes, ma'am.

* * *

Q. Nurse Wiseman, was this portion of the Rules and Regulations in effect in March of 2000?

A. Yes.

Q. Upon what do you base that opinion?

A. It has where the amendments are at the end of each section. I also made a call to the Tennessee State Board of Nursing and spoke with Jeffrey Costen, Jerry, I have his name written down, and asked him if, in fact, this Rule was in effect and he told me that it had be [sic] not been changed since February 1 of 1990 as I had verified from the amendment section at the end.

Q. What was Jerry Costen's position with the Tennessee Board of Nursing?

A. He is the Regulations Manager.

Nurse Wiseman's testimony in the offer of proof regarding whether the 2003 version of Tenn. Comp. R. & Reg. 1000-1-.04(3)(B) was the same as the 2000 version was based on the administrative history of the rule and her telephone conversation with an employee of the Tennessee Board of Nursing. As we have discussed above, the administrative history of an administrative rule cannot be "received, recognized, referred to and used" by courts to establish the regulatory law of Tennessee. Furthermore, Nurse Wiseman's conversation with Mr. Costen was hearsay, which would also be inadmissible to establish the validity of the Nursing Rules at issue.

Tennessee Rule of Evidence 402 provides, in part, that "[e]vidence which is not

relevant is not admissible."[5] Tenn. R. Evid. 402. Because the 2003 version of the Nursing Rules is not relevant to determining issues arising from the treatment of Ms. Latiff's chemotherapy complications in 2000, we hold that the Trial Court did not err by refusing to admit the Nursing Rules into evidence. Our ruling on this issue is controlled by the fact that Plaintiff did not establish that the rules as requested to be admitted were in effect at the time of Defendants' alleged negligence. If Plaintiff instead had offered the 2000 Nursing Rules as evidence, they may well have been admissible as one piece of evidence, along with the required expert witness' proof, for the jury to consider in determining the recognized standard of acceptable professional practice for Knoxville nurses in 2000.

Plaintiff also argues that the Trial Court erred in excluding evidence regarding the statutory definition of the practice of nursing, the statutory definition of the practice of medicine, and the illegality of a nurse's prescription of a Schedule V narcotic. This assertion of error apparently stems from the Trial Court's order taking judicial notice of "the law and rules and regulations referenced in Plaintiff's Motion for Judicial Notice" and the Trial Court's subsequent refusal to allow the statutes and nursing rules and regulations to be admitted into evidence or used as the basis for questions to the parties' expert witnesses. Plaintiff's Pretrial Motion for Judicial Notice requested that the Trial Court take judicial notice of the following:

> 1. Lomotil is a Schedule V drug and was at all times relevant to this action. (See 2000 PDR entry, attached hereto, and T.C.A. 39-17-414(c)).
>
> 2. Prescribing drugs constitutes the practice of medicine. (T.C.A. 63-6-204).
>
> 3. The practice of medicine also includes diagnosis and treatment. (Id.).
>
> 4. The practice of nursing does not include diagnosis or the development of a medical plan of care and therapeutics. (T.C.A. 63-7-103(b)).
>
> 5. The definition of the practice of nursing does include reference to exceptions for nurse practitioners and physician's assistants to prescribe medications in certain circumstances, but no exception exists which allows an RN to prescribe medications. (T.C.A. 63-7-103(b)).

[5]"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

> 6. The exception which allows certified nurse practitioners to prescribe medications requires that such person register with the board of nursing and file therewith a copy of the formulary describing the categories of drugs to be prescribed. (T.C.A. 63-7-123(b)(1)).
>
> 7. This exception also provides that the nurse practitioner who is issued a certificate of fitness may prescribe Schedule V drugs upon adoption of physician supervisory rules by both the board of medical examiners and board of nursing. (T.C.A. 63-7-123(b)(2)).
>
> 8. Also, the nurse practitioner who prescribes medications pursuant to a Certificate of Fitness must maintain at her place of practice a copy of the written protocol which she utilizes. (T.C.A. 63-7-123(b)(4)).
>
> 9. The Board of Nursing has the authority to establish and examine the criteria for Certificates of Fitness which allow nurse practitioners to prescribe medications under limited circumstances. (T.C.A. 63-7-207(14)).
>
> 10. The director of the division of health related boards has the duty to provide the names of all nurse practitioners and/or physicians' assistants who are authorized to write and sign prescriptions to the board of pharmacy, along with the name of the supervising physician.
>
> 11. Rules and Regulations promulgated by the Board of Nursing are attached hereto, and counsel requests this Court to take judicial notice of these provisions pursuant to T.R.E. 202(b)(2).

As with Plaintiff's issue regarding exclusion of the Nursing Rules, we point out that just because a court takes judicial notice of the law, the court is not required to admit that law into evidence. In fact, the Tennessee Rules of Evidence prohibit a court from admitting evidence which is not relevant. Tenn. R. Evid. 402. While Plaintiff attached a copy of the Lomotil entry in the 2000 edition of the Physicians' Desk Reference, as indicated in its motion, Plaintiff did not attach copies of the referenced statutes in effect in March of 2000. Plaintiff also failed to indicate the year of the statutes in its citations contained in the Pretrial Motion for Judicial Notice. There is no proof in the record that Plaintiff established that the statutes it sought to admit into evidence were in effect during the period of Defendants' alleged negligence. Without such proof, we find that Plaintiff failed to establish that these statutes were relevant to the issues before the jury, and we find no error in the Trial Court's exclusion of this proposed evidence.

B. Expert Witnesses

Plaintiff alleges that the Trial Court erred in allowing extensive voir dire of Plaintiff's expert witness, Dr. Greenberg. The Supreme Court of Tennessee has held as follows regarding a trial court's rulings about expert testimony:

> In general, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). The trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused.

McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997). Before considering Plaintiff's allegations regarding Defendant's voir dire of Dr. Greenberg, we must review the elements of a medical malpractice action and the facts that must be established to qualify someone as an expert witness. Tennessee Code Annotated § 29-26-115 provides in pertinent part:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.
>
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection

> (b) when it determines that the appropriate witnesses otherwise would not be available.

Tenn. Code Ann. § 29-26-115(a)-(b).

Plaintiff's counsel conducted a brief examination of Dr. Greenberg in an effort to establish his qualifications to testify as an expert witness. When Plaintiff's counsel asked that he be recognized as an expert witness, defense counsel requested an opportunity to voir dire Dr. Greenberg. Plaintiff's counsel neither initially objected to the voir dire nor requested that the voir dire be conducted outside the presence of the jury. The Trial Court permitted defense counsel to voir dire Dr. Greenberg. Plaintiff's counsel objected when defense counsel began asking the witness about how nurses are supervised, stating, "Your Honor, I have no objection to his voir dire of the witness, but we aren't even attempting to qualify Dr. Greenberg as a nursing expert." In response, the Trial Court admonished defense counsel that his questioning "does go beyond voir dire" and that "[i]n voir dire you're simply attempting to elicit sufficient facts to establish that this witness is not qualified to proffer the opinions that are solicited by the plaintiff." The Trial Court later overruled a second objection by Plaintiff's counsel when defense counsel asked Dr. Greenberg about his knowledge of what the nurses at his clinic were taught regarding treatment of chemotherapy-induced diarrhea. In response to yet another question about nursing, Dr. Greenberg stated that he was not testifying regarding the authority of nurses, only the authority of physicians. Defense counsel then moved to disallow Dr. Greenberg's testimony, at which time the Trial Court excused the jury.

While the jury was absent from the courtroom, the Trial Court and counsel for both parties discussed the requirements of Tenn. Code Ann. § 29-26-115 pertaining to the required qualifications of expert witnesses in a medical malpractice suit. Defense counsel acknowledged that Dr. Greenberg met the qualifications for an expert witness as outlined in Tenn. Code Ann. § 29-26-115(b), stating, "He's licensed. He's a physician. He is in a contiguous state. And he has a bare minimum, I think, to meet that initial threshold. I will concede that."

However, the Trial Court expressed concerns about whether Dr. Greenberg was familiar with the standard of care in Knoxville or a similar community, stating as follows:

> But what have you shown about his knowledge about the similarity between Knoxville, Tennessee, medically speaking, and Durham, North Carolina? See, that's what I'm struggling with. He may know; I don't know. But I don't know. I don't determine these things by osmosis. What has the proof shown about that? What do you say the proof has shown to this point?

Defense counsel, not surprisingly, agreed there was insufficient evidence that Dr. Greenberg was familiar with the applicable standard of care. Plaintiff's counsel summarized Dr. Greenberg's previous testimony regarding his familiarity with the applicable standard of care. After additional discussion, Plaintiff requested an opportunity to question Dr. Greenberg further in response to

Defendant's voir dire. The Trial Court granted the request. The jury was called back in to hear additional testimony by Dr. Greenberg elicited by Plaintiff's counsel. This was followed by additional voir dire by defense counsel.

At the conclusion of the second round of voir dire by defense counsel, the Trial Court once again excused the jury before engaging counsel for both parties in a discussion about whether Dr. Greenberg was qualified to testify as an expert witness. Addressing its comment to Plaintiff's counsel, the Trial Court stated as follows:

> I question whether or not there may be a little bit, a scintilla, of proof here such that the Court of Appeals says, well, Judge, you should have let him testify.
>
> And so under the circumstances, I'm going to overrule the objection and hear all his proof. It can be dealt with later on. But I'll tell you I think you've got a real problem. You have a real problem, the question of the sufficiency of this proof. But I overrule the objection.

Following the Trial Court's ruling, the jury was summoned back to the courtroom, and Dr. Greenberg was permitted to testify as an expert witness.

It is rare for a party to assert error about the qualification of his witness as an expert witness when that party's witness is permitted to testify as an expert, but that is the situation we are faced with here. Specifically, Plaintiff argues that:

> The "voir dire" by defense counsel constituted cross-examination rather than voir dire, and was improper and prejudicial. The Trial Court abused its discretion in allowing this type of extensive cross-examination of a facially and admittedly qualified witness in the presence of the jury even before direct examination, thereby creating an inference which undermined this witness's credibility and the weight to be given his testimony.

We were confronted with a similar situation in *Oldham v. Pickett*, No. 01-A-01-9211-CV-00441, 1993 WL 95590 (Tenn. Ct. App. M.S., April 2, 1993). In *Oldham*, plaintiff's witness, Dr. Dingfelder, was presented during discovery as an expert on the issues of standard of care and causation, but not damages. *Id.* at *1. However, during direct examination at trial, plaintiff's counsel began asking Dr. Dingfelder questions about damages. Defense counsel objected and was given permission to voir dire Dr. Dingfelder on the topic of damages. After summarizing these facts, we stated as follows regarding the voir dire complained about by plaintiff:

> There was no contemporaneous objection to the timing of or the holding of the voir dire, there was no request that it be conducted outside the presence of the jury, nor was there a request for a mistrial.
>
> It is a well established rule in Tennessee that "a party must complain and seek relief immediately after the occurrence of a prejudicial event." *Gotwald v. Gotwald*, 768 S.W.2d 689, 694 (Tenn. App. 1988). Moreover, a request for a mistrial must be made as soon as its grounds are known, otherwise, it will be deemed waived. *Spain v. Connolly*, 606 S.W.2d 540, 544 (Tenn. App. 1980). Here, the plaintiff took no steps to prevent or nullify the harmful effect of error, thus, this issue has been waived. See Tenn. R. App. P. 36(a).
>
> Furthermore, we do not believe that it was error to conduct the voir dire in the middle of direct examination. While preliminary matters should be determined outside the hearing of the jury when justice so requires, Tenn. R. Evid 104(c), according to the Advisory Commission Comments, this decision is within the discretion of the trial court.

Id. As in *Oldham*, Plaintiff's counsel did not object initially to defense counsel's voir dire of Dr. Greenberg, nor did she request that the voir dire be conducted outside the presence of the jury. Furthermore, Plaintiff's counsel apparently did not consider the extensive voir dire as being so prejudicial that it justified a mistrial, as none was requested.

Finally, we note that the Trial Court did allow Dr. Greenberg to testify as an expert witness for Plaintiff and did not limit his testimony in any manner. Given that trial courts have wide discretion in matters pertaining to the qualification of a witness as an expert witness, we do not believe that Plaintiff has established that the Trial Court abused its discretion, which is admittedly a heavy burden, by permitting defense counsel to conduct an extensive voir dire of Dr. Greenberg.

C. Jury Instructions

The propriety of jury instructions given in a particular case is a question of law, which we review *de novo* with no presumption of correctness. *Ellis v. Pauline S. Sprouse Residuary Trust*, No. E2006-01771-COA-R3-CV, 2007 WL 3121666, at *3 (Tenn. Ct. App. E.S., Oct. 26, 2007) (citing *Solomon v. First Am. Nat'l Bank*, 744 S.W.2d 935, 940 (Tenn. Ct. App. 1989)). When issues involving the jury charge are raised on appeal, we review the jury charge in its entirety and consider it as a whole in order to determine whether the Trial Court committed prejudicial error. The charge will not be invalidated as long as it fairly defines the legal issues involved in the case and does not mislead the jury. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992). Furthermore, we must abide by the mandate of Tenn. R. App. P. 36(b), which states: "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless,

considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."

Plaintiff first alleges that the Trial Court erred in referencing the standard for "oncology nurses" in its jury instructions because Nurse Phillips was not an oncology certified nurse. Plaintiff alleges that "the instruction to the jury was misleading and implied a higher requisite standard of skill and learning, and a higher standard of care." We are unable to comprehend how this, even if so, could prejudice Plaintiff's case. If such a charge did indeed cause the jury to assign a higher standard of care to the conduct of Nurse Phillips, that would benefit Plaintiff's case and not Defendants'. Plaintiff also alleges that because Plaintiff's nursing expert was not oncology certified, "the erroneous charge also necessarily shifted a greater weight to the testimony of the defendants' nursing expert." We disagree. Nurse Phillips, although not oncology certified, worked at East Tennessee Oncology, an oncology practice, for nearly a decade before Ms. Latiff's death. We find no error in the Trial Court's instruction that she was an oncology nurse, despite her lack of oncology certification, and we do not think this aspect of the jury charge affected the weight to be given to the testimony of any of the expert witnesses in this trial.

Plaintiff also raises an issue regarding the Trial Court's denial of Plaintiff's request for special jury instructions regarding the statutory definition of the practice of medicine, the statutory definition of the practice of nursing, and negligence per se. Plaintiff submitted a Special Request for Jury Instructions, which read as follows:

> The plaintiff, by and through counsel, hereby submit [sic] the following requests for Jury Instructions, including the following:
>
> 1. Instruction on The Practice of Nursing; T.C.A. 63-7-103;
>
> 2. Instruction on The Practice of Medicine; T.C.A. 63-6-204; and
>
> 3. Instruction of Negligence Per Se; T.P.I. 3.09.

We find no error with the Trial Court's refusal to give any of these instructions. First, a party must submit proposed language for the special jury instructions requested, not just cite to a particular statute. This is especially true for lengthy statutes of which only certain portions, if any, may be relevant to the issues in the case. Our reasoning is mirrored in the Trial Court's remark on this topic during the hearing on Plaintiff's Motion for a New Trial: "What specifically about the practice of nursing was I supposed to charge?" The Trial Court should not be put in the position of having to guess what a requested instruction should be. It is the duty of the party requesting a charge to identify the specific language requested rather than merely citing to a long and detailed statute. Furthermore, the statutes cited by Plaintiff, as with the citations in Plaintiff's Motion for Pretrial Judicial Notice, did not identify the year of the statutes which were to be used for the special instructions. We find no error by the Trial Court on this issue.

Regarding Plaintiff's request for a Tennessee Pattern Jury Instruction about negligence per se, we believe that a negligence per se instruction would not have been appropriate in this medical malpractice action. Tennessee Code Annotated §§ 29-26-115(a) and (b) specify that both the standard of care and any breach of that standard of care, with only very limited exceptions, must be established by expert testimony.

In *Holt v. City of Memphis*, paramedic employees of the defendant failed to transport the decedent to the hospital the first time they were called to the decedent's residence because they did not believe she was sick enough to go to the hospital. *Holt v. City of Memphis*, No. W2000-00913-COA-R3-CV, 2001 WL 846081, at *1 (Tenn. Ct. App. W.S., July 20, 2001). When they were called to the home a few hours later, the decedent was unconscious. The paramedics transported her to the hospital, where she died seven days later. *Id.* The trial court found that the paramedics were negligent based on their failure to comply with Tennessee statutes and the rules of the Emergency Medical Service Board regarding examination and treatment of patients, and the trial court entered a judgment in favor of plaintiffs. *Id.* at *4. On appeal, we reversed the trial court's ruling, stating, "[U]nder all of these circumstances, evidence that the paramedics failed to transport the decedent to the hospital, in the absence of expert testimony that the failure to do so breached the applicable standard of care, is insufficient to support a judgment against the defendants." *Id.* at *8.

More recently, in *Conley v. Life Care Centers of America, Inc.*, we affirmed the dismissal of a plaintiff's claim based on the alleged violation of federal statutes regarding nursing home care. *Conley v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713 (Tenn. Ct. App. 2007). In doing so, we stated:

> Plaintiff contended Life care was required to maintain the nursing home in compliance with the minimum statutory standards and failing to do so constituted negligence per se. . . . Life Care . . . contended the federal regulations, if applicable, would constitute a national standard of care. We have concluded Life Care is correct . . . .
>
> * * *
>
> In this medical malpractice action, Plaintiff must prove the "recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices [Centerville, Tennessee] or in a similar community at the time the alleged injury or wrongful action occurred." Tenn. Code Ann. § 29-26-115(a). The statutory scheme does not permit a plaintiff in a medical malpractice action to rely on a so-called national standard of care to establish a violation of acceptable professional practices in a medical community in Tennessee.

Conley, 236 S.W.3d at 733-34 (bracketed text in original).

In a similar case, the U.S. District Court for the Eastern District of Tennessee, relying on *Conley,* dismissed a plaintiff's negligence per se claims that were based on violation of state and federal nursing home regulations. *Brown v. Sun Healthcare Group, Inc.*, 476 F. Supp. 2d 848 (E.D. Tenn. 2007). In doing so, the District Court stated, "Because the acts fall under the purview of the [Tennessee Medical Malpractice Act], the plaintiff's negligence per se claims must fail, as there can be no presumption of negligence under the TMMA unless the plaintiff establishes *res ipsa loquitor* [sic], which she has not done. *See* Tenn. Code Ann. § 29-26-115(c)."[6] *Id.* at 852. We believe this is a correct statement of Tennessee law under our Medical Malpractice Act, and therefore, the Trial Court did not err in refusing instruct the jury on negligence per se.

Plaintiff also claims error because the Trial Court gave a jury instruction regarding a "mistake in judgment." Specifically, in its initial charge the Trial Court stated:

> It is possible for physicians and nurses to err in judgment or be unsuccessful in the case of a physician in his diagnosis or treatment without being negligent. An error of judgment is not necessarily evidence of a want or lack of skill or care because mistakes and miscalculations are incident to all of the businesses of life and a physician will not be liable for a mistake in judgment so long as he exercises the reasonable and ordinary care and competence that is common to his calling and his specialty.

The Trial Court gave a similar instruction in its second charge to the jury. Plaintiff asserts that these "mistake in judgment" or "error in judgment" charges are "inconsistent with the statutory requirements of T.C.A. 29-26-115(a), and are therefore misleading when used in medical malpractice cases."

This Court has already rejected the premise of Plaintiff's argument. In *Patton v. Rose*, we held that an error in judgment charge, also known as an honest mistake charge or a mistake in judgment charge, is a correct statement of the law. *Patton v. Rose*, 892 S.W.2d 410, 415 (Tenn. Ct. App. 1994). As we noted in *Ward v. Glover*, Tennessee courts have "consistently held that this charge is appropriate." *Ward v. Glover*, 206 S.W.3d 17, 41 (Tenn. Ct. App. 2006). We note that both of these cases were decided under our current medical malpractice laws as set forth in Tenn. Code Ann. § 29-26-115, *et seq*. Therefore, we find Plaintiff's assertion that the Trial Court's "error in judgment" charge was inconsistent with Tennessee law to be without merit.

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[6]Subsection (c) of Tenn. Code Ann. § 29-26-115 allows a rebuttal presumption of negligence for *res ipsa loquitur* situations, providing as follows: "In a malpractice action as described in subsection (a), there shall be no presumption of negligence on the part of the defendant; provided, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence." Tenn. Code Ann. § 29-26-115(c).

As an alternative, Plaintiff maintains that the "error in judgment" charge was improper because Defendants did not defend this action on the basis of an error in judgment. Plaintiff relies on our holding in *Godbee v. Dimick* as support for this proposition. *Godbee v. Dimick*, 213 S.W.3d 865 (Tenn. Ct. App. 2006). In *Godbee*, we stated as follows:

> The difficulty in applying "honest mistake" in this case is the lack of an evidentiary basis for it. Dr. Dimick denies any mistake, honest or otherwise, and his defense does not envision "honest mistake." . . . *Patton v. Rose* and other cases cited are based on a finding that evidence of honest mistake existed in the record. There being no evidence in this record to support such defense, it was error to give the instruction.

Id. at 890.

Plaintiff is correct in stating that Defendants did not assert any error in judgment by either Dr. Dobbs or Nurse Phillips, and Defendants did not defend on that basis. Therefore, we conclude that the Trial Court erred by giving an "error in judgment" charge. However, we do not find that such a charge constituted reversible error, as we do not believe, and Plaintiff has presented no evidence, that the "error in judgment" charge "more probably than not affected the judgment or would result in prejudice to the judicial process." *See* Tenn. R. App. P. 36(b). Even in *Godbee*, we did not find that the trial court's "error in judgment" charge was reversible error. Our reversal of the judgment in that case was based upon reversible error in the trial court's refusal to permit rebuttal testimony from the plaintiff's expert witness and the trial court's jury instruction setting forth a different standard to be applied to the plaintiff's expert witness testimony than that of the defendant. *Godbee*, 213 S.W.3d at 878, 882. For the above reasons, we hold that while the Trial Court erred by giving an "error in judgment" charge, that error was harmless.

Plaintiff raises additional challenges to the jury charge, including the Trial Court's instructions regarding duty and standard of care, specialties and subspecialties, and foreseeability. Plaintiff alleges that those instructions "are inconsistent with the precise parameters of Tenn. Code Ann. § 29-26-115(a)." We disagree.

We first note that Plaintiff did not raise the issue of the jury instruction regarding foreseeability in his Motion for New Trial or Supplemental Motion for New Trial. As a result, Plaintiff has waived this issue on appeal. Tenn. R. App. P. 3(e).[7]

We have carefully reviewed the remaining jury instructions which Plaintiff has set

[7]Our Rules of Appellate Procedure provide in pertinent part: "[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in . . . jury instructions granted or refused . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." Tenn. R. App. P. 3(e).

forth as reversible error. We find no error in any of these instructions. Notably, Plaintiff also failed to cite to any case law which holds that instructions such as the ones Plaintiff complains of are inaccurate statements of law or otherwise reversible error, and we have found none in our research. Therefore, we find this issue to be without merit.

Plaintiff also maintains that the Trial Court erred in failing to give a correct and consistent charge. As we stated earlier, we review the jury charge in its entirety to determine whether the Trial Court committed prejudicial error. The charge will not be invalidated as long as it fairly defines the legal issues involved in the case and does not mislead the jury. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d at 446. A careful reading of the Trial Court's instruction and reinstruction of the jury convinces us that the Trial Court fairly defined the legal issues in this medical malpractice action and did not give any instructions that might have misled the jury. We find no prejudicial error in the jury charge.

Finally, Plaintiff alleges that the Trial Court erred in failing to reduce the jury charge to writing. Tennessee Code Annotated § 20-9-501 states as follows regarding jury instructions:

> On the trial of all civil cases, it is the duty of the judge before whom the civil case is tried, *at the request of either party, plaintiff or defendant*, to reduce every word of the judge's charge to the jury to writing, before it is delivered to the jury, and all subsequent instructions which may be asked for by the jury, or which may be given by the judge, shall, in like manner, be reduced to writing before being delivered to the jury.

Tenn. Code Ann. § 20-9-501. Thus, the Trial Court was required to reduce the jury instructions to writing before the instructions were delivered to the jury if, and only if, a party requested that the Trial Court do so. Neither Plaintiff nor Defendants in this case made such a request, and Plaintiffs do not contend otherwise.

Therefore, we hold that the Trial Court did not have a duty to prepare written jury instructions, and the Trial Court's failure to prepare written jury instructions before the instructions were given to the jury was not error. The fact that the jury requested a copy of the charge or that the Trial Court had to reinstruct the jury on a significant portion of its original charge does not change our conclusion. Tennessee law, for better or worse, requires written jury instructions in a civil case only if a party requests them. The Trial Court did not err on this issue.

III. Conclusion

After careful review, we find that the Trial Court did not commit reversible error during the trial of this case. We affirm and remand to the Trial Court for collection of costs. Costs on appeal are taxed against the Appellant, Philip Latiff, as Executor of the Estate of Mary Woods Latiff, and his surety, if any.

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D. MICHAEL SWINEY, JUDGE